sponding creation of confusion in the financial markets should not be underestimated.

In the current uncertain environment created by the decision of the court of appeals, the involvement of this Court is needed to re-stabilize the environment and reduce litigation costs. The court of appeals' decision has sent taxpayers and state and local government down a path from which there is no turning back. Unless this Court grants review, there will be unavoidable confusion, uncertainty and rampant litigation regarding the availability of state tax incentives. Further, the uncertainty created by the breadth of the Sixth Circuit's decision has already begun to impact the ability of those states to compete for investment and expansion of business. Without review of the issue by this Court, the Sixth Circuit states will continue to suffer this disadvantage while the issue festers through years of litigation in other states.

A. The Court of Appeals' Decision Upsets Settled Expectations and the Reasonable Reliance Interests of Taxpayers, Jurisdictions that Offer Incentives, and Others.

All parties to this benefits equation have long-settled expectations that their mutual commitments would be respected and upheld. Most large companies have reasonably relied on the plethora of tax incentives that are today available in all 50 states and many localities. The indicia of such reliance are undeniable. They include, but are certainly not limited to, negotiations/contracts with state economic development agencies and revenue agencies; the design and implementation of capital investments that will qualify for particular state and local tax incentives; the reflection of such expenditures on tax returns (e.g., positions and disclosures), the maintenance of work force in place, and investment in employee training. Based as well on the actions of their counterparts, companies may reasonably rely on these incen-

tives; state legislatures, state executive branches, state revenue departments and local governmental entities have designed, implemented, and administered the incentives in concert, over the course of many years.

Likewise, state and local governments have reasonably relied on the availability of a variety of tax incentives to attract and retain businesses, especially in economically disadvantaged areas. State and local governments must develop and enact budgets annually. These budgets often are dependent upon estimates of tax revenues and expenditures. A critical component for many state and local jurisdictions in developing reliable budget estimates is reasonable reliance on commitments derived from tax incentive arrangements. Striking down common tax incentives, like the Ohio investment tax credit, undoubtedly will upset the stability of budgets in a substantial number of jurisdictions.

Investors have also come to expect that this kind of common investment incentive is, and has long been, constitutional. While the Court has consistently struck down discriminatory tax provisions,[4] the investment tax credit that was struck down in *Cuno* is different and does not unconstitutionally discriminate. First, a nondomiciliary taxpayer

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[4] *See, e.g., Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318 (1977) (overturned New York transfer tax imposed at higher rates on sales of stock occurring on non-New York exchanges); *Maryland v. Louisiana*, 451 U.S. 725 (1981) (overturned Louisiana first-use tax on natural gas that applied to all purchases except those by Louisiana consumers, due to exemption/credit scheme); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (overturned Hawaii wholesale excise tax on liquor that exempted locally produced pineapple liquor); *Westinghouse Electric v. Tully*, 466 U.S. 388 (1983) (overturned New York franchise tax credit for DISCs that was subject to reduction to the extent that DISC makes export sales from non-New York locations); *Associated Ind. of Missouri v. Lohman*, 511 U.S. 641 (1994) (overturned Missouri use tax on interstate sales that was imposed at occasionally higher rates than sales tax on intrastate sales).

and state/local government representatives are seeking *jointly* to overturn the decision. This case is unlike any other case where this Court has considered whether a state tax provision violates the Commerce Clause. This unusual alignment of interests evidences the commonly held view that the Ohio investment tax credit, and others like it, are valid.

Second, tax incentives encourage economic growth; they do not discriminatorily limit growth. In this regard, the Ohio investment tax credit and analogous incentives are consistent with the fundamental purpose of the Commerce Clause and this Court's decisions: to ensure the free flow of goods among states and to ensure that states do not engage in economic protectionism.[5] Further, they are not intended to, and do not in fact, erect economic barriers between the states for the reasons set forth below.

Nearly every state provides some form of investment tax credit, which is tailored to the individual state's needs and economic priorities. The Ohio investment tax credit, like many other tax incentives, does not contain discriminatory prerequisites to qualification, nor is the credit reduced or eliminated as a result of an increase in out-of-state activity by a recipient of the tax credit or any other person. For instance, the Ohio investment tax credit is not limited to companies incorporated in the state—any company (regardless of state of incorporation or domicile) that chooses to invest in the

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[5] *See, e.g., Associated Ind. of Missouri v. Lohman*, 511 US 641, 647 (1994): "The [Commerce] Clause prohibits economic protectionism--that is, 'regulatory measures designed to benefit in state economic interests by burdening out of state competitors.' *Id.*, at 273-274. Thus, we have characterized the fundamental command of the Clause as being that 'a State may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State,' *Armco Inc.* v. *Hardesty*, 467 U.S. 638, 642 (1984), and have applied a 'virtually *per se* rule of invalidity' to provisions that patently discriminate against interstate trade. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978)."

statutorily prescribed fashion may qualify for the Ohio credit. Other types of state tax provisions complement the adoption of tax incentive measures; for example, the significant adoption by states of single sales factor apportionment formulas[6] is similarly designed to enhance a state's ability to retain and/or attract the location of manufacturing or other corporate facilities in-state. These credits are generally intended to mitigate the tax increases (at least in the short run) that often result from the effect of in-state investment on a taxpayer's apportionment formula by virtue of increased in-state property and payroll. In short, the Ohio income tax incentive is an integral part of state taxation and is consistent with the purpose of the Commerce Clause.

B. The Court of Appeals' Decision Provides an Unworkable Rule.

The decisional standard that this Court articulated in *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, (1977)—namely, that a discriminatory tax incentive "*forecloses tax-neutral decisions*"—was misapplied by the Court of Appeals. While *Boston Stock Exchange* itself was correctly decided, the standard articulated in the decision is ambiguous, and as reflected in the underlying decision, can lead to wildly erroneous results without additional practical guidance on the standard's correct application. Even the Court of Appeals below articulated its unease with this standard; asserting that "[t]he United States Supreme Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes," the Court nevertheless found it possible to conclude that the Ohio investment tax credit has a "coercive" effect on taxpayers (*i.e.*, one that precludes tax-neutral decisions on the part of those taxpayers who might

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[6] *See, e.g.*, New York's recent adoption of single sales factor for income tax apportionment purposes effective 2008. N.Y. Tax Law § 210(3)(a)(10)(A)(iii) (2005).

qualify for the incentive). *Cuno v. DaimlerChrysler*, 386 F.3d 738, 743 (6th Cir. 2005).

Nearly every business decision and investment involves tax consequences that are considered and influence the decision itself. So, for instance, a business decision concerning where to manufacture automobiles would necessarily involve consideration of material costs (including sales taxes, excise taxes and other transaction taxes), labor costs (including employment taxes), and facility costs (including property taxes and depreciation deductions for income tax purposes). No one would suggest that the tax provjsions impacting these business decisions (e.g., generally imposed sales taxes, employment taxes and income taxes) are unconstitutional merely because they influence business decisions, and by definition, foreclose "tax-neutral decision making." Similarly, the Ohio tax credit does not unconstitutionally discriminate against interstate commerce.

Further, the "tax-neutral decision making" standard, as applied by the Court of Appeals, suffers from other defects. The Sixth Circuit found the Ohio investment tax credit "discriminates against interstate economic activity by coercing businesses already subject to the Ohio franchise tax to expand locally rather than out-of-state. Specifically, any corporation currently doing business in Ohio, and therefore paying the state's corporate franchise tax in Ohio, can reduce its existing tax liability by locating significant new machinery and equipment within the state." *Cuno*, 386 F.3d at 743. Does the court's analysis mean that the investment tax credit would be constitutional, had the taxpayer not already been subject to Ohio franchise tax? It is clear, using the court's rationale, that a company without a preexisting Ohio franchise tax would not be "coerced" into expanding in Ohio as that taxpayer would not have existing Ohio tax liability to reduce. However, a taxpayer without a preexisting Ohio franchise tax liability may find Ohio's tax provision just as

attractive as a taxpayer with a preexisting Ohio tax liability—in both cases, taxpayers would be seeking to avoid a tax associated with new activity—thereby undermining any justification for a different constitutional result.

This Court should ensure that its prior precedent is applied in such a way that permits states to encourage in-state investment provided the benefit is equally available to all and does not lead to tax increases on those that do not elect to participate.

CONCLUSION

For the reasons stated above, *amici curiae* respectfully request the United States Supreme Court to accept this case for review.

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No. 04-1724

In The
Supreme Court of the United States
October Term, 2005

WILLIAM W. WILKINS, TAX COMMISSIONER FOR THE STATE OF OHIO, et al.,
Petitioners,
v.

CHARLOTTE CUNO, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE STATES OF FLORIDA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MISSOURI, NEBRASKA, OREGON, TENNESSEE, NEVADA, NORTH DAKOTA, SOUTH DAKOTA, TEXAS, UTAH, THE COMMONWEALTHS OF KENTUCKY AND VIRGINIA, AND THE DISTRICT OF COLUMBIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the dormant Commerce Clause allow a State to attempt to attract new business investment in the State by offering credits against the State's general corporate franchise or income tax, where the amount of the credit is based on the amount of a business's new investment in the State?

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Maryland v. Louisiana, 451 U.S. 725 (1981) 7

McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944) 9

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West Lynn Creamery v. Healy, 512 U.S. 186 (1994) 8, 9

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LEGISLATIVE MATERIALS

151 Cong. Rec. S5437 (daily ed. May 18, 2005) 4, 6, 7

Economic Development and the Dormant Commerce Clause: the Lessons of Cuno v. Daimler Chrysler and Its Effect on State Taxation Affecting Interstate Commerce: Hearings Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 109th Cong. (May 24, 2005) 3

OTHER AUTHORITIES

Jennifer Carr & Cara Griffith, *Litigation and Tax Incentives After the Downfall of Ohio's ITC*, 36 St. Tax Notes 367 (2005) 4

Robert J. Firestone, *State Investment Tax Credits Do Not Violate the Dormant Commerce Clause*, 36 St. Tax Notes 189 (2005) 7

Walter Hellerstein & Dan T. Coenen, *Commerce Clause Restraints on State Business Development Incentives*, 81 Cornell L. Rev. 789 (1996) 9

Deen Kemsley, *The Effect of Taxes on Production Location*, 36 J. Acct. Res. 321 (1998) 6

Robert J. Rolfe & Richard A. White, *Investors' Assessment of the Importance of Tax Incentives in Locating Foreign Export-Oriented Investment: An Exploratory Study*, 14 J. Am. Tax'n Ass'n, 39, 40 (1992) 6

Louise E. Single, *Tax Holidays and Firms' Subsidiary Location Decisions*, 21 J. Am. Tax'n Ass'n 17 (1999) 6

Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 Harv. L. Rev. 379 (1998) 9

Edward A. Zelinsky, *Cuno v. DaimlerChrysler: A Critique*, 34 St. Tax Notes 37 (2004).....3

INTEREST OF *AMICI CURIAE*

Each of the undersigned States has tax incentives designed to encourage businesses to locate and invest within their borders. These incentives are crucial to the States' ability to compete in the global marketplace and to attract investment to economically depressed areas.

In the decision below, the Sixth Circuit held that an Ohio investment tax credit ("ITC") against the State's corporate franchise tax violated the dormant Commerce Clause in that it resulted in differential tax treatment between businesses that expand within the State and businesses that expand out of state. The Sixth Circuit's holding (based on a previously-untested academic legal theory) substantially blurred the lines between a State's permissible efforts to promote economic development within its borders and impermissible discriminatory tax treatment and has created considerable uncertainty for States seeking to promote in-state economic activity through investment tax incentives.

As a result, corporations will be less willing to rely on location-based tax incentives out of concern that those incentives may ultimately be held unconstitutional. Moreover, due to the lack of clarity in the Sixth Circuit's opinion, States are incapable of effectively responding to these concerns. The Sixth Circuit's decision in this case thus undermines *every* State's ability to encourage investment in depressed areas, and to compete with other States and with foreign nations for economic investment.

REASONS FOR GRANTING THE PETITION

I. The Sixth Circuit's opinion presents no logical means of distinguishing permissible investment tax incentives from impermissible discriminatory tax treatment.

"States are free to 'structure their tax systems to encourage the growth and development of intrastate commerce and industry.'" *Trinova Corp. v. Michigan Dep't of Treasury*, 498 U.S. at 385-86 (1991) (quoting *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 336 (1977)). Indeed, "[i]t is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of [a] taxing State." *Trinova Corp.*, 498 U.S. at 385.[1]

Based on this pronouncement, state tax incentives designed to encourage businesses to make in-state capital acquisitions have survived scrutiny under the dormant Commerce Clause. *Caterpillar, Inc. v. Dep't of Treasury*, 488 N.W.2d 182, 192-94 (Mich. 1992), *cert. denied*, 506 U.S. 1014 (1992); *Jefferson Smurfit Corp. v. Dep't of Treasury*, 639 N.W.2d 269, 273-74 (Mich. Ct. App. 2001), *appeal denied*, 656 N.W.2d 519 (Mich. 2002), *cert. denied*, 538 U.S. 1033 (2003); *see also Cuno v. DaimlerChrysler, Inc.*, 154 F. Supp. 2d 1196, 1202-03 (N.D. Ohio 2001), *rev'd in part*, 386 F.3d 738 (6th Cir. 2004).

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[1] *See also West Lynn Creamery v. Healy*, 512 U.S. 186, 199 n.15 (1994) (noting that the Court has never squarely addressed the constitutionality of a direct subsidy and recognizing "that States may try to attract business by creating an environment conducive to economic activity, as by maintaining good roads, sound public education, or low taxes"); *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 816 (1976) (Stevens, J., concurring) ("Nor, in my judgment, does [the Commerce Clause] inhibit a State's power to experiment with different methods of encouraging local industry. Whether the encouragement takes the form of a cash subsidy, a tax credit, or a special privilege intended to attract investment capital, it should not be characterized as a 'burden' on commerce.").